NUMBER 13-19-00426-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

EMILY A. PETERSON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 156th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Justice Hinojosa

Pursuant to a plea bargain agreement, appellant Emily A. Peterson pleaded guilty to child endangerment, a state jail felony, in exchange for the dismissal of two felony drug offenses, and she was placed on deferred adjudication community supervision. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(d), 481.113(c); TEX. PENAL CODE ANN. § 22.041(f). By one issue, Peterson contends her guilty plea was involuntary. We affirm.

I. BACKGROUND

On December 18, 2018, Peterson was indicted on three counts: child endangerment, a state jail felony; possession of a Penalty Group 1 controlled substance in an amount of less than 1 gram, a state jail felony; and manufacture and delivery of a Penalty Group 1 controlled substance in an amount more than 4 grams but less than 400 grams, a first-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.112(d), 481.113(c); TEX. PENAL CODE ANN. § 22.041(f). On August 8, 2019, as part of a plea agreement with the State, Peterson agreed to plead guilty to the child endangerment offense if the State dismissed the drug offenses.

At her plea hearing on June 6, 2019, Peterson testified that she understood the child endangerment offense for which she was being charged and its range of punishment, that she could withdraw her guilty plea if the trial court did not accept the agreement she made with the State, that she was not under the influence of drugs or alcohol, that she was not under the care of a physician for a mental illness, and that she was satisfied with her attorney's representation. Although Peterson stated that she was not happy with her attorney's representation a few weeks prior to the plea hearing, when pressed by the trial court if she was "fine with him today," Peterson responded, "yes." Peterson's attorney stated on the record that Peterson was competent and understood all of the admonishments associated with her plea bargain with the State.

As part of her written plea agreement, Peterson initialed thirteen admonishments, acknowledging among other things that she was: (1) aware of the consequences of her plea, (2) mentally competent to stand trial, (3) making her plea freely and voluntarily, (4)

totally satisfied with the representation provided to her by counsel and received effective and competent representation, and (5) consenting to written stipulations of evidence in this case. The trial court further asked Peterson if her attorney explained these admonishments and whether she understood that she was waiving certain rights knowingly and willingly, to which she responded, "yes." Peterson ultimately pleaded "guilty" to the child endangerment charge.

On August 8, 2019, the trial court sentenced Peterson to five years' deferred adjudication community supervision and explained the following to her:

> COURT: All right. Ms. Peterson, after reviewing the Presentence Investigation Report and having found that the evidence substantiates your guilt, the Court is placing you on five years' deferred adjudication. There will be no fine, nor restitution, but court costs are a part of this sentence. As for the terms and conditions of your probation, the Court is going to add SAFPF [Substance Abuse Felony Punishment Facility], and you'll be going to SAFPF first and then ISF [Intermediate Sanction Facility]. This is a plea bargain agreement that you have reached with the State that I have followed, and as a result, you have no right to appeal my decision without my permission. Should you choose to appeal, you have 30 days to begin that process, and you would need to contact [your attorney] to begin that process. That is not permission. That is information. Do you understand?
>
> PETERSON: Yes.

Six days later, Peterson filed a pro se notice of appeal on August 14, 2019. In the notice, she claimed she "had no communication with my lawyer" regarding her plea and that he did not "explain[] anything." The trial court appointed Peterson appellate counsel on September 4, 2019. Peterson's new counsel filed an amended notice of appeal, a motion for new trial, a motion for appellate bond, and motion to amend the trial court's

certification of the right to appeal on September 5, 2019. In the motion for new trial, Peterson set forth two arguments: (1) that her original plea was made under duress and was not voluntary; and (2) that she received ineffective assistance of counsel.[1]

At the hearing on the motion for new trial, Peterson testified that she had four court-appointed attorneys during the pendency of her underlying cases which caused confusion. She further testified that her most recent attorney, Alfred Montelongo, did not explain the effects of pleading guilty to the child endangerment offense, the probation process, or the conditions of her probation:

> Q. And then a fourth attorney was appointed to you, correct?
>
> A. Correct.
>
> Q. And who was that attorney?
>
> A. That was Alfred Montelongo.
>
> Q. And from the time you were arrested until Mr. Montelongo was appointed to you, about how long a period of time was that?
>
> A. About a year, a little over a year.
>
> Q. From about the time Mr. [Montelongo] was appointed to you until the time of guilty, about how long a time was that?
>
> A. It was a few months.
>
> . . . .
>
> Q. Okay. And then what happened after that?
>
> A. He [Montelongo] basically said the offer was still on the table, wasn't going to change whether I testified or not, and that was the only option. There was supposed to be an evaluation done before given my actual time at sentencing from what I understood.

[1] At the hearing on the motion for new trial, Peterson orally asserted another ground: that she was "actually innocent" of the child endangerment offense.

Q. Did you understand that you were going to be accepting a plea of guilty and placed on deferred probation at that time?

A. Yes.

Q. Did he explain to you what the consequences could be of that?

A. No.

Q. Okay. What specifically did he not explain to you?

A. He didn't explain the SAFPF treatment, ISF, none of that. He explained the PSI because there were to be numerous evaluations done to determine the length of whatever treatment they were trying to give me.

Q. Did he explain the possible family law of a plea of guilty even if deferred, pursuant to Chapter 262 of the Penal Code?

A. No, sir, he did not.

Q. Did you discuss any possible family law consequences at all?

A. No.

Q. Without getting too far into it, there was a CPS case involving your children, correct?

A. Yes.

Q. Your rights were not terminated. You're still currently possessory conservator of your children, correct?

A. Yes.

Q. Out of two of those children, one of them is here in Beeville, correct?

A. Yes. Sort of, yes.

Q. And so am I correct in saying you did not understand, one, that your plea of guilty would be enacted before all of the PSI went through; am I correct?

A. Correct.

Q. Am I correct you didn't understand the collateral consequences as it relates to family law in this case, correct?

A. Correct.

Q. And, three, do you believe that your attorney most properly explained what the consequences could be for a plea of guilty in a deferred case in terms of various programs and how long it would take and all of that? Do you believe your attorney properly explained that to you?

A. No, he did not.

Q. How many times did you and your defense attorney speak?

A. Twice very briefly in person.

Q. About how long total would you say that you two conversed?

A. He was very quick. Like the decision was already made, and we talked to the DA I want to say a total of maybe 15 to 20 minutes.

Q. Okay.

In response, the State argued that Peterson understood the probation process, but was now discontent with the decision she made. The State elicited the following testimony on cross-examination:

Q. But you understood that you would be on probation for a period of time?

A. Deferred adjudication, yes, following assessments that were supposed to be done.

Q. And how long were you going to be on probation?

A. Up to five years, so depending on the assessments.

Q. And you understood that if you violated that probationary—something during that probationary period, that you could be sentenced up to two years in the state jail?

A. Yes. That was on my sentencing date August 8th, yes.

Although the trial court granted the motion for new trial on September 27, 2019, this order was void. The Texas Court of Criminal Appeals has held that a motion for new trial is not permissible when a defendant is placed on deferred adjudication because there is no finding or verdict of guilt in a deferred adjudication. *Donovan v. State,* 68 S.W.3d 633, 636 (Tex. Crim. App. 2002).[2]

Peterson now appeals the order of deferred adjudication, contending her plea was made involuntarily. *See Brown v. State*, 943 S.W.2d 35, 42 (Tex. Crim. App. 1997) (defendant who receives deferred adjudication as part of plea bargain may raise involuntariness claim on appeal following adjudication); *see also Swafford v. State*, No. 03-03-00344-CR, 2004 WL 903877, at *1 (Tex. App.—Austin Apr. 29, 2004, no pet.) (mem. op., not designated for publication) ("Nothing in *Donovan* precludes a defendant from challenging the voluntariness of his plea in an appeal from an order deferring adjudication.").

II. STANDARD OF REVIEW & APPLICABLE LAW

"A guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the right not to incriminate oneself." *Rios v. State*, 377 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd) (citing *Kniatt v. State,* 206 S.W.3d 657, 664 (Tex. Crim. App. 2006)). "The 'overriding concern' in reviewing the constitutional validity of a guilty plea is 'whether a defendant has been

[2] The trial court granted Peterson's request for an amended certification of defendant's right to appeal on October 24, 2019. *See* TEX. R. APP. P. 25.2(a)(2).

deprived of due process and due course of law.'" *See id*. "To satisfy due process, a guilty plea 'must be entered knowingly, intelligently, and voluntarily.'" *Kniatt,* 206 S.W.3d at 664). We consider the entire record in determining the voluntariness of a guilty plea. *See Martinez v. State,* 981 S.W.2d 195, 197 (Tex. Crim. App. 1998).

"When, as here, the record reflects that the defendant was duly admonished by the trial court before entering a guilty plea, it presents a prima facie showing that the plea was both knowing and voluntary." *Rios*, 377 S.W.3d at 131; *see Martinez,* 981 S.W.2d at 197. The burden then shifts to the defendant to show that she entered the plea without understanding the consequences of her actions and was harmed as a result. *See Martinez,* 981 S.W.2d at 197. A defendant's sworn representation that her guilty plea was voluntary "'constitutes a formidable barrier in [a] subsequent collateral proceeding.'" *Kniatt,* 206 S.W.3d at 664 (quoting *Blackledge v. Allison,* 431 U.S. 63, 73–74 (1977)). However, a plea is involuntary when it is "induced by threats, misrepresentations, or improper promises." *Kniatt,* 206 S.W.3d at 664 (citing *Brady v. United States,* 397 U.S. 742, 755 (1970)).

III. **ANALYSIS**[3]

At her plea bargain hearing, Peterson testified under oath that she understood the child endangerment offense for which she was pleading guilty and its range of punishment, and that she could withdraw her guilty plea if the judge did not accept the agreement she made with the State. She also testified that she was mentally competent and not under the influence of drugs or alcohol when she made the decision to plead

[3] We note that appellee, the State of Texas, did not file a response brief in this case.

guilty. Although Peterson informed the court that she was previously dissatisfied with her attorney's legal assistance, on the day of her plea, she stated that she was satisfied with his representation.

The record also shows that Peterson initialed thirteen admonishments, acknowledging among other things that she was: (1) aware of the consequences of her plea, (2) mentally competent to stand trial and that her plea was freely and voluntarily made, (3) totally satisfied with the representation provided to her by counsel and received effective and competent representation, and (4) consenting to written stipulations of evidence in this case. The trial judge questioned Peterson about whether her attorney explained these admonishments and if she understood that she was waiving certain rights knowingly and willingly, to which she responded, "yes."

Peterson, under oath, made both oral and written representations that she understood the nature of her guilty plea and that it was voluntary. This "constitutes a formidable barrier in [this] subsequent collateral proceeding" in which she argues she pleaded guilty involuntarily or under duress. *See Kniatt,* 206 S.W.3d at 664; *see also Guevara v. State*, No. 14-16-00701-CR, 2018 WL 771218, at *5 (Tex. App.—Houston [14th Dist.] Feb. 8, 2018, pet. ref'd) (mem. op., not designated for publication) (holding that an "accused who attests when he enters his plea of guilty that he understands the nature of his plea and that it is voluntary has a heavy burden on appeal to show that his plea was involuntary.").

Although Peterson argues that her attorney mispresented the terms of her probation, specifically, the SAFPF and ISF conditions, the trial court itself explained those

conditions of probation in open court on the record. And after the court explained that SAFPF and ISF were terms of her probation, it asked Peterson whether she understood these conditions. Peterson responded, "yes." Peterson has failed to meet her burden to show that her guilty plea was "induced by threats, misrepresentations, or improper promises." *See Kniatt*, 206 S.W.3d at 664. In fact, in exchange for this guilty plea to a state jail felony, she received dismissals to two drug offenses, including a first-degree felony and another state jail felony.[4]

In light of the foregoing record, we conclude that Peterson's plea was voluntary. We overrule her sole issue on appeal.[5]

IV. CONCLUSION

We affirm the judgment of the trial court.

LETICIA HINOJOSA
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
4th day of June, 2020.

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[4] At the hearing on the motion for new trial, Peterson testified that her attorney did not explain the family law consequences of her guilty plea on a child endangerment offense. She did not, however, brief this issue in her appellate brief. *See* TEX. R. APP. P. 38.1. We note for the record that "[g]enerally, a guilty plea is considered voluntary if the defendant was made fully aware of the direct consequences." *State v. Jimenez*, 987 S.W.2d 886, 888 (Tex. Crim. App. 1999). A plea will not be rendered involuntary by lack of knowledge regarding a "collateral consequence." *See id.*; *see also State v. Vasquez*, 889 S.W.2d 588, 590 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (listing employment difficulties, the ineligibility to vote or serve jury duty, and travel restrictions as collateral consequences to guilty pleas). Texas law also considers the effect of guilty pleas on parental rights as a collateral consequence. *See Talbott v. State*, 93 S.W.3d 521, 526-27 (Tex. App.—Houston [14th] 2002, no pet.). Accordingly, even if this issue was briefed, our disposition of the voluntariness of Peterson's plea would remain the same.

[5] Although Peterson asserted three grounds for her motion for new trial—that her plea was involuntary, that she received ineffective assistance of counsel, and that she was "actually innocent"—she only asserted the issue of voluntariness on appeal. Accordingly, we only addressed the voluntariness issue. *See* TEX. R. APP. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").